United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 19, 2001

TO : Rosemary Pye, Regional Director
Ronald Cohen, Regional Attorney
Paul Rickard, Assistant to Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

530-6067-4055-8500
SUBJECT: Alan Ritchey, Inc. 530-8049
Cases 1-CA-38668, 1-CA-38670, and 1-CA-38679

These cases were submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act by continuing its practice of unilaterally imposing discretionary discipline after the Union was newly certified.

FACTS

Since June 1999, Alan Ritchey, Inc. (the Employer) has operated a facility providing contract services to the U.S. Postal Service in Chicopee, Massachusetts. Employees at the facility are told during orientation and in subsequent supervisory counseling that the Employer expects regular attendance, work to the best of each employee's ability, and cooperation. Employees are told that certain absences will be excused under certain circumstances, such as medical appointments for which employees have doctor's excuses. Although employees are not informed that a specific number of attendance "occurrences" will result in discipline, the Employer actually has standards linking specific discipline to the number of occurrences. The Employer also informs its inspectors (a unit position) that, after an initial training period, they will be terminated if they do not maintain their production at 100 percent.

The Employer distributes an Employee Handbook that sets forth and explains the various levels of progressive discipline, but it also explicitly states that the Employer has the right to skip any or all steps in its disciplinary procedure. The Employer also has set forth a schedule of discipline in an internal operating manual given to its supervisors and managers setting forth the levels of conduct that warrant particular disciplinary action; it has generally followed these guidelines. Thus, an employee is generally not terminated prior to accumulating at least

11.5 unexcused attendance occurrences. Further, the Employer has ordinarily counseled employees who fail to meet certain performance or attendance benchmarks. Significantly, however, the Employer admits, and the evidence establishes, that the Employer has deviated from the specified action or standard in a number of individual instances.

In March 2000,[1] American Postal Workers Union, Springfield MA Area Local 497, AFL-CIO (the Union) was certified as the exclusive collective-bargaining representative of a unit of employees at the Employer's Chicopee facility. Since March, the Union has filed approximately 50 charges against the Employer, many of which involve discretionary terminations or other disciplinary action taken by the Employer. The Region has made determinations in all but the instant cases, and has not submitted any of the other cases for advice.

The instant cases involve the termination of four individuals -- Armande LaPointe, James Dupuis, Fuquan Oliver, and Kenneth A. Zyra. The Employer admits, and the evidence establishes, that the Employer exercised discretion in terminating each of the four, and that their terminations were not mandated by the performance or attendance benchmarks set forth in the Employer's Employee Handbook or internal operating manual. The Employer defends its conduct by asserting that its exercise of such discretion is not a violation of its bargaining obligation because it has a "past practice" of imposing discipline based upon unilateral discretion, as set forth in its Employee Handbook and internal operating manual.

The Employer also defends against one of the charges, involving Armande LaPointe, by asserting that it is untimely under Section 10(b) of the Act.[2] The Employer claims it sent a letter on April 27 to LaPointe, who was home on an extended absence due to a broken ankle, advising her that "because of [her] separation on April 26, [she] will not receive further pay or benefits from Alan Ritchey, Inc." LaPointe denies that she received this letter.

LaPointe states that, during her absence, she spoke on the phone monthly with the Employer's Director of Human Resources, John Knight, who told her not to worry about her

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[1] All dates hereinafter are 2000, unless otherwise indicated.

[2] The charge involving LaPointe was filed on December 18; the Section 10(b) period therefore began on June 18.

job, to take care of herself, and that he would see her at the end of June. In June, LaPointe phoned Knight to inform him that she would be able to return to work on July 1. Knight said fine, that LaPointe still had her position. Knight denies that he had any conversations with LaPointe during this period.

Both LaPointe and Knight agree that LaPointe phoned Knight on June 28 to ask about what paperwork she should have with her when she returned to work on July 1. Knight told LaPointe that the Employer was overstaffed, and that there was no position available for her. Knight noted that LaPointe's request to return to work on July 1 coincided with the elimination of the third shift, which took place in May or June, and the subsequent transfer of interested third-shift employees into first-and second-shift positions, under an agreement with the Union. It is undisputed that there was no specific notification to the Union that the Employer had terminated LaPointe or refused to allow her to return.

The Union filed the charges in the instant cases between December 15 and December 18, alleging the Employer violated Section 8(a)(3) and (5) of the Act by its termination of the four employees. The Region has determined there is insufficient evidence to warrant further proceedings with regard to the 8(a)(3) allegations and has only submitted the Section 8(a)(5) allegations to the Division of Advice.

ACTION

We conclude that the Employer violated Section 8(a)(5) by unilaterally imposing discretionary discipline upon LaPointe, Dupuis, Oliver, and Zyra.

An employer must bargain with the union representing its employees before it undertakes unilateral discretionary acts involving mandatory subjects of bargaining, even where: (1) the union has been recently certified or recognized; and (2) the employer is merely continuing to exercise the same kind of discretion it had previously exercised prior to the union's certification or recognition.[3] For example, in Eugene Iovine, Inc., the

[3] See, e.g., Eugene Iovine, Inc., 328 NLRB No. 39, slip op. at 1-4 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001) (discretionary reduction in employee hours was "precisely the type of action over which an employer must bargain with a newly-certified Union," as "there was no 'reasonable certainty' as to the timing and criteria for [such] a reduction"); NLRB v. Katz, 369 U.S. 736, 746 (1962)

Board found that an employer violated Section 8(a)(5) when it unilaterally reduced employees' hours of work, despite the employer's argument that it had a past practice of reducing employees' hours during business slowdowns. The Board emphasized that "there was no 'reasonable certainty' as to the timing and criteria for a reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours 'appears to be unlimited.'"[4] Significantly, the Board made it clear that it is an employer's burden to establish that its action was consistent with a past practice that has become a term and condition of employment; the General Counsel does not have to show a departure from past conduct.[5]

In the instant cases, as in Eugene Iovine, the Employer acted unilaterally with unlimited discretion in an area where there was no reasonable certainty as to the specifics of the Employer's conduct.[6] Indeed, the Employer

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(employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion"); Adair Standish Corp., 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (employer could no longer continue unilaterally to exercise its discretion with respect to layoffs after union was certified, despite past practice of instituting economic layoffs). See also, e.g., Daily News of Los Angeles, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) (employer violated Section 8(a)(5) by unilaterally discontinuing its practice of granting merit wage increases at set times, even though the actual granting of the increases required bargaining with newly-certified union about amounts).

[4] Eugene Iovine, 328 NLRB No. 39, slip op. at 1.

[5] Id., slip op. at 2 fn. 2.

[6] We note that McClatchey Newspapers, 321 NLRB 1386 (1996), enfd. in relevant part, 131 F. 3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998), cited by the Region, also stands for the principle that an employer may not unilaterally reserve to itself sole discretion to act in mandatory subjects of bargaining. We would not, however, primarily rely on McClatchey Newspapers, as that case involves issues related to the implemention of bargaining proposals after impasse not presented in the instant cases. Eugene Iovine, in contrast, addresses an employer's continued unilateral exercise of previously claimed discretion after a union's initial certification, and the

admits that it acted with unilateral discretion. In any case, the evidence clearly demonstrates that the Employer acted with discretion in terminating each of the four employees at issue, and that their termination was not mandated by the performance or attendance benchmarks set forth in the Employer's Employee Handbook or internal operating manual. Moreover, as the Employer apparently acknowledges, an employer's disciplinary system is a mandatory subject of bargaining under the provisions of Section 8(d) of the Act.[7] Therefore, the Employer's conduct violated Section 8(a)(5), unless the Employer can establish that its actions were consistent with a past practice that has become a term and condition of employment.

While the Employer bases its defense of its conduct by asserting its "past practice" of imposing discipline based upon unilateral discretion, it is clear that such a claim does not privilege the Employer's conduct in the instant cases. In order to find that a past practice has become a term or condition of employment, the Board requires that the practice be satisfactorily established by practice or custom.[8] Acting based upon unlimited discretion is not a "practice" which has evolved into a term or condition of employment, even where there is a history of such discretionary conduct predating the union's certification or recognition.[9] Instead, it is "precisely the type of action over which an employer must bargain with a newly-certified Union."[10] Thus, even under the Employer's own

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employers' failure to bargain over these unilateral acts -- precisely the circumstances presented in the instant cases.

[7] See, e.g., Our Way, Inc., 268 NLRB 394, 416 (1983) ("[r]espondent, by unilaterally changing its rules governing absenteeism and tardiness, and by instituting and enforcing a new discipline system without first bargaining with the Union, thereby violated Section 8(a)(5) and (1) of the Act"); W-I Forest Products Co., 304 NLRB 957, 965 (1991) ("[c]learly the appropriate discipline to be meted out is a mandatory subject of bargaining," citing Capital Times Co., 223 NLRB 651 (1976); Purolator Products Co., 289 NLRB 986 (1988)).

[8] Eugene Iovine, 328 NLRB No. 39, slip op. at 4, citing Exxon Shipping Co., 291 NLRB 489, 493 (1988), and cases cited therein.

[9] Id.

[10] Id., slip op. at 1, quoting NLRB v. Katz, 369 U.S. at 746.

characterization of its conduct with regard to these four employees, it has not established its affirmative defense of a past practice.

Finally, we agree with the Region's conclusion that the Employer has not established a 10(b) defense as to Armande LaPointe because the Employer has not successfully shown that LaPointe received clear notice of her termination on April 27, outside the 10(b) period.[11] LaPointe claims that she never received any letter indicating that she had been terminated. In any event, the "separation" language of the letter the Employer claims to have sent on April 27 is ambiguous, particularly in light of LaPointe's extended absence from work for medical reasons. Finally, LaPointe claims that she had a series of telephone calls subsequent to April 27 in which the Employer's Human Resources Director, John Knight, told her not to worry about her job, to take care of herself, and that LaPointe still had her position. These conversations vitiate the claimed import of the April 27 letter.[12]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally imposing discretionary discipline upon LaPointe, Dupuis, Oliver, and Zyra.

B.J.K.

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[11] See, e.g., Postal Service Marina Center, 271 NLRB 397, 400 (1984).

[12] Knight denies that he had any conversations with LaPointe during the relevant period. [*FOIA Exemption 5*

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